

In the Supreme Court of Ohio

Newegg, Inc.,	:	
	:	Case No. 2015-0483
	:	
Appellant,	:	
	:	Appeal from the Ohio
v.	:	Board of Tax Appeals
	:	
Joseph W. Testa,	:	
Tax Commissioner of Ohio,	:	BTA Case No. 2012-234
	:	
Appellee.	:	

**APPELLANT NEWEGG INC.'S AGREED MOTION TO STAY BRIEFING PENDING A
DECISION ON APPELLANT'S MOTION TO CONSOLIDATE AND APPELLEE'S
MOTION TO DISMISS**

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**APPELLANT NEWEGG INC.'S AGREED MOTION TO STAY BRIEFING PENDING A
DECISION ON APPELLANT'S MOTION TO CONSOLIDATE AND APPELLEE'S
MOTION TO DISMISS**

Appellant Newegg Inc. (“Newegg”) hereby moves, with the agreement of the Appellee Tax Commissioner of Ohio (“Commissioner”), pursuant to S.Ct.Prac.R. 4.01(A)(1), to stay briefing in this appeal pending a decision by the Court on: (1) Newegg’s Motion to Consolidate With Appeal of Crutchfield, Inc. (Case No. 2015-0386) (“Motion to Consolidate”); and (2) the Commissioner’s Motion to Dismiss Appellant’s Assignments of Error Numbers 1 and 3 (sic), each recently filed with the Court. Newegg obtained the Commissioner’s assent to this motion on June 16, 2015. As grounds for the motion, Newegg states as follows:

1. Newegg’s opening brief is due on June 30, 2015.
2. As set forth in the Motion to Consolidate, this appeal and the substantially identical appeal of Crutchfield, Inc. (“Crutchfield”) present many common issues for resolution by the Court. On May 8, 2015, Crutchfield filed a Motion to Consolidate its appeal with Newegg’s case, which is pending before the Court. Newegg has formally joined Crutchfield in seeking consolidation of the two cases by filing its Motion to Consolidate on June 16, 2015. The Commissioner did not consent to the Motion to Consolidate.
3. The Commissioner on June 10, 2015 filed substantially identical Motions to Dismiss in this case and the *Crutchfield* appeal, arguing that the appellants have failed to properly preserve their respective as-applied challenges to the constitutionality of the Ohio Commercial Activity Tax (“CAT”). Newegg vigorously disputes the Motion to Dismiss its as-applied constitutional challenge. Significantly, due to the timing of the Motion to Dismiss, Newegg must prepare

and file a response to the Commissioner's motion within the time otherwise reserved for preparing Newegg's merit brief.

4. Even more fundamentally, the Motion to Consolidate and the Motion to Dismiss both potentially affect the content, and perhaps even the form (if the Court requests joint briefing upon consolidation) of the merits brief to be filed by Newegg. In its Motion to Consolidate, anticipating possible adjustments, Newegg has requested that the Court enter a new briefing schedule to align the briefing for each of the consolidated cases. In short, based on the outcome of pending motions, certain adjustments to the briefing may well be required; at a minimum, resolution of the motions by the Court is necessary to determine the issues to be addressed (*i.e.*, as to the as-applied challenge) and the posture of the appeal (*i.e.*, consolidated, or not).
5. No prejudice will result to the appellee from a stay in the briefing schedule while the Court considers the Motions to Consolidate and Dismiss. Indeed, the Commissioner has directly affected the briefing schedule in this case and in the *Crutchfield* appeal, by filing identical Motions to Dismiss in each appeal prior to the submission of the merits briefs. Resolution of the motions is necessary to establish both the future course of proceedings and content of the briefs.

For the foregoing reasons, Newegg, with the Commissioner's agreement, respectfully requests that the Court: (1) stay the briefing in this case; and (2) enter a new briefing schedule, affording Newegg forty (40) days from the later of the resolution of the Motions to Consolidate or the resolution of the Motions to Dismiss to submit its merits brief, whether separately or as part of a consolidated appeal.

Filed: June 17, 2015

Respectfully submitted,

s/ Edward J. Bernert
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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Appellant Newegg, Inc.'s Agreed Motion to Stay Briefing Pending a Decision on Appellant's Motion to Consolidate and Appellee's Motion to Dismiss was sent via the Court's electronic filing system and served by email and U.S. mail to counsel of record for Appellee Tax Commissioner, Daniel W. Fausey and Christine T. Mesirov, Assistant Attorneys General, State of Ohio, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428, on this 17th day of June, 2015.

s/ Edward J. Bernert
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One of the Attorneys for Appellant
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